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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN LUTZ,

Plaintiff and Appellant,

v.

FIRST AMERICAN ESCROW
TRANSFERS, INC.,

Defendant and Respondent.

D052734

(Super. Ct. No. GIC875343)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn and Judith F. Hayes, Judges. Affirmed.

Plaintiff and appellant John Lutz appeals from a judgment dismissing First American Escrow Transfers, Inc. (Escrow Transfers) from this action after sustaining its

demurrer to his second amended complaint (SAC) without leave to amend.¹ In the SAC, Lutz alleged causes of action against Escrow Transfers for fraud, civil conspiracy to commit fraud, negligence and breach of fiduciary duty stemming out of the 2001 sale of the Melody Mobile Home Park (Mobile Park) in El Cajon, California.

Lutz contends the trial court erred in sustaining Escrow Transfers's demurrer to the SAC without leave to amend because he had addressed each of the concerns identified as deficient by the court when it sustained Escrow Transfers's demurrer to his first amended complaint (FAC), the SAC stated causes of action against Escrow Transfers, and his counsel specifically represented that the SAC could be further amended to add facts if any deficiencies in the complaint remained.

Having reviewed the four causes of action alleged in the SAC in light of the record and applicable law set out below, we conclude the trial court did not abuse its discretion in sustaining without leave Escrow Transfers's demurrer to the SAC and in then dismissing Escrow Transfers from this action. We, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This action stems mainly from the alleged fraudulent conduct of Lutz's real estate agent and "very smooth confidence man," Ralph Frengel, whose misdeeds covered more than 10 years of time and involved multiple transactions concerning the sale, transfer, and/or mortgage of various parcels of real property owned by Lutz. In his complaint filed

¹ Although Lutz originally appealed from the court's minute order sustaining the demurrer without leave and dismissing the action as to Escrow Transfers, he has subsequently filed an appropriate judgment of dismissal. We construe the notice of appeal as being from such judgment of dismissal. (Cal. Rules of Court, rule 8.104(e).)

November 9, 2006, based on causes of action for injunctive relief, fraud, breach of fiduciary duty and financial abuse of a dependent adult (Welf. & Inst. Code, § 15657.5), Lutz named Frengel as the major defendant who had allegedly defrauded Lutz of hundreds of thousands of dollars through the series of real estate schemes beginning in 1995 by taking advantage of Lutz's mental and physical impairments to become his trusted friend and confidant.² Lutz also named multiple escrow companies as defendants for the fraud and breach of fiduciary duty causes of action based on their paying out proceeds from property transactions to others without Lutz's permission, knowledge or authorization.

One such company, Commerce Title Company (Commerce), filed a demurrer to the complaint on grounds that the fraud and breach of fiduciary duty causes of action failed to state facts sufficient to constitute a cause of action and were uncertain. Commerce specifically argued that the fraud cause of action failed to allege "who made the fraudulent representation, whether he/she was authorized to speak for the corporation, who received the communication, what was said or written, or when the alleged communication took place." Regarding the fiduciary duty cause of action, Commerce argued that Lutz had failed to allege "any facts supporting the existence of a fiduciary relationship with [Commerce] or how [Commerce] breached that duty. [Lutz] does not

² Lutz alleged he was a "dependent adult" under Welfare & Institutions Code section 15610.23, subdivision (a) because "he had difficulty with reading, he had short term memory problems, impaired judgment and communication ability" as a result of "childhood rheumatic fever, scarlet fever in 1994, and the extreme stress caused by his many years of working as a tow truck operator reporting to auto accident scenes, many of them gruesome."

allege that he ever submitted escrow instructions to [Commerce] or that [Commerce] acted contrary to the escrow instructions."

Based on the parties' motion papers, the trial court issued a tentative ruling sustaining Commerce's demurrer with leave to amend within 10 days to "replead [the challenged second and third causes of actions for fraud and breach of fiduciary duty] bearing in mind the well taken assertions presented in [Commerce's] general and special demurrer. Plaintiff's opposition in fact concedes the demurrer assertions by requesting leave to amend on several occasions. [Citations.]" On January 19, 2007, the court confirmed the tentative ruling as the final ruling on the demurrer.

Escrow Transfers was subsequently served with the original complaint on February 1, 2007, by substitute service, and again on March 14, 2007. With regard to the Mobile Park sale in January 2001, paragraph 74 of that complaint alleged in part that Frengel "had placed a third mortgage with himself, using the alias M. Martinez Frengel, as the holder on the Mobile Home Park in the amount of \$389,000.00. This mortgage was arranged by defendant [Escrow Transfers] without the authorization of [Lutz] . . . Defendant [Escrow Transfers] paid without authorization by [Lutz] multiple bills, in addition to the mortgages, totaling in excess of \$45,000." In paragraph 75, Lutz alleged that "[Escrow Transfers] defrauded [Lutz] of the park itself and approximately \$1,300,00.00."

These paragraphs were incorporated by reference in the fraud cause of action which alleged in paragraph 120 that Escrow Transfers "falsely represented to the general public that [it] provided quality services related to real estate transactions which met legal

standards, made false representations to plaintiff and/or concealed material information from plaintiff that [it was] under a duty to disclose as described above. These representations were made for the purpose of inducing [Lutz] to become a client of [Escrow Transfers]." In paragraph 121, Lutz alleged that "[i]n reality . . . [Escrow Transfers] knew that [it] did not provide quality real estate broker, salesperson or escrow agent services [for its] clients, and [was] not a reliable choice for such services. Had [Lutz] known the true facts, he would not have become a client of [Escrow Transfers]." Lutz alleged that he justifiably relied upon the misrepresentations and failures to disclose which were intended by Escrow Transfers and the other defendants that he rely upon to his economic detriment. He also alleged that Escrow Transfers's actions were "deliberate, willful and [in] conscious disregard of [his] rights" as well as being "malicious, oppressive and fraudulent."

In the breach of fiduciary duty cause of action, Lutz incorporated by reference all the earlier paragraphs and alleged in paragraph 126 that Escrow Transfers was "licensed by the State of California as [a] real estate escrow agent[and] owed [Lutz] fiduciary duties not to aid in fraudulent transactions against him nor to disburse funds owned by [him] held in escrow accounts without [his] knowledge or approval." In paragraph 127, Lutz alleged that "[b]y virtue of the relationship[] that existed between [Escrow Transfers] and [himself], and the trust and confidence that reasonably was reposed by [him] in the integrity and fidelity of [Escrow Transfers] by virtue of [that] relationship[, Escrow Transfers] owed to [him] a fiduciary duty to put [his] needs . . . ahead of [its

own] interests. . . ." Lutz alleged that Escrow Transfers breached "said duties to [him and he] was damaged in an amount to be proven at trial."

Before Escrow Transfers filed any responsive pleading to the original complaint, Commerce filed a motion on March 29, 2007 to dismiss the action due to Lutz's failure to file his amended complaint. After a hearing on May 18, 2007, the court granted Lutz leave to file his belated amended complaint. Other than adding additional factual paragraphs regarding various transactions, the allegations of the fraud and fiduciary duty causes of action were identical to those pled in the original complaint except for being renumbered; i.e., paragraphs 112 and 113 of the FAC were the same as paragraphs 120 and 121 of the original fraud cause of action recited above and paragraphs 120 and 121 of the FAC were the same as paragraphs 126 and 127 of the original complaint.

In the general allegations that were incorporated into each cause of action, Lutz asserted in paragraph 26 that Escrow Transfers was "under an affirmative duty to investigate the status of [Frengel]'s license . . . before agreeing to act as escrow agents, prior to disbursing any funds to [Frengel] or at [Frengel]'s direction, and prior to giving [Frengel] documents required to be given to [Lutz]." Lutz also alleged that Escrow Transfers "either knew or should have known that [Frengel] was unlicensed."

Regarding the Mobile Park sale, Lutz added the following paragraphs in the FAC regarding Escrow Transfers's involvement:

"[¶] 85. Defendant [Escrow Transfers] was the escrow agent selected by [Frengel] to facilitate the sale of the mobile home park to [defendant James Heiser. Escrow Transfers] was licensed by the State of California and was at all relevant times subject to the California Financial Code, the California Business & Professions

Code and all other California laws and regulations. Defendant [Escrow Transfers] was required to verify that [Frengel] was a fully licensed real estate broker prior to disbursing any funds to him. [Frengel] was not fully licensed and [Escrow Transfers's] disbursement of funds to [Frengel] was a violation of law. [(Bus. & Prof. Code § 10138.)]

"[¶] 86. [Escrow Transfers] disbursed a total of \$31,234.77 in 'Assumption Charges' to persons unknown. Such charges are normally paid by the buyer, in this case [Heiser], however, these charges were assessed against [Lutz] without his knowledge or approval. [Escrow Transfers] paid \$20,000 to [Frengel] for property tax reimbursement without obtaining verification that [Frengel] had actually paid the property taxes with his own money. Plaintiff is informed and believes and thereon alleges that [Escrow Transfers] employee Ronee Kozlowski acted as the escrow officer and that Ms. Kozlowski was informed that [Heiser] was paying [Frengel] \$389,000.00 'off-the-books' and, consequently, [Escrow Transfers] breached it[s] fiduciary duty to [Lutz] by allowing said transaction to be 'off-the-books' without [Lutz's] knowledge.

"[¶] . . . [¶] 88. [Escrow Transfers] also paid a \$19,089.84 to Barnett Construction. This payment to Barnett Construction was without [Lutz's] knowledge or authorization. [Escrow Transfers] had an affirmative duty to verify that any construction bills paid were for construction that was actually completed on the property. [Escrow Transfers] breached their duty in that the \$19,089.94 paid to Barnett Construction was for work done on a completely different property owned by [Heiser. Escrow Transfers] was a knowing participant in defrauding [Lutz].

"[¶] 89. Plaintiff is informed and believes that [Escrow Transfers] paid unknown commissions to [Frengel] on the sale of the mobile home park. [Heiser] was not represented by a broker other than [Frengel].

"[¶] 90. [Escrow Transfers] also failed to disburse the net proceeds of the sale of the mobile home park to [Lutz]. According to the closing statement, [Lutz] was entitled to receive \$157,975.75 as the net proceeds (this does not include the \$389,000.00 paid to [Frengel] by [Heiser]). [Escrow Transfers] never issued a check to [Lutz] for this amount. [Lutz] is informed and believes and thereon alleges

that [Escrow Transfers] either paid this amount to [Frengel] or kept the money itself or split it with [Frengel].

"[¶] 91. [Lutz] requested all documents related to these transactions from [Escrow Transfers] in 2005. [Escrow Transfers] denied that they had any records of these transactions and refused to provide any documentation. [Escrow Transfers] concealed and/or destroyed documents they were required to maintain."

On August 10, 2007, Escrow Transfers demurred to the FAC on grounds the causes of action for fraud and breach of fiduciary duty failed to state facts sufficient to constitute a cause of action against Escrow Transfers and that the fraud cause of action was also uncertain as it could not be discerned from the FAC whether Lutz was alleging a cause of action for an affirmative misrepresentation, a concealment or a non-disclosure. Escrow Transfers specifically argued that the fraud allegations were deficient against it, a corporate entity, for failing "to allege the name of any persons who made a misrepresentation, their authority to speak for the corporation, what they said or wrote and when it was said or written." In addition, the allegations regarding fraud failed to specifically plead any alleged knowledge of the falsity of any misrepresentation by Escrow Transfers, any intent to deceive Lutz by Escrow Transfers, any intent to induce reliance by Escrow Transfers or any justifiable reliance by Lutz on any misrepresentation.

As to the breach of fiduciary duty cause of action, Escrow Transfers argued Lutz had failed to allege any facts that would establish a breach of fiduciary duty if true because "no facts are alleged that demonstrate a breach of the limited duties established by the escrow instructions." Escrow Transfers pointed out that in order for any of the

alleged disbursements in the FAC to be actionable against it, they would necessarily have to be in violation of the escrow instructions or otherwise not signed off by Lutz.

Concurrently with the demurrer, Escrow Transfers also filed a request for judicial notice of Frengel's broker license certification, which showed the various dates and restrictions on his broker's license.

In his opposition to the demurrer, Lutz claimed that due to the extent of the fraud perpetrated against him, he was not aware of which specific individuals made the misrepresentations to him and that some of the misrepresentations were general statements by Escrow Transfers to the general public which included him. Although Lutz maintained that "as currently pled, the [FAC] sufficiently states causes of action for fraud and breach of fiduciary duty," he requested leave to file a second amended complaint if the court believed the FAC requires additional facts to state a cause of action for fraud.

On October 5, 2007, the court confirmed its tentative rulings granting Escrow Transfers's unopposed judicial notice request and sustaining its demurrer to the FAC with leave to amend. In doing so, the court specifically stated:

"The Court sustains with ten days leave to amend defendant Escrow Transfers'[s] general and special demurrer to the first cause of plaintiff's first amended complaint for fraud. The first cause of action fails to plead fraud with the required specificity. For instance, no specific facts are alleged regarding the name of the person who made the actual representation to plaintiff and their authority to speak for defendant Escrow Transfers, no specific facts are alleged that show knowledge of the falsity of any representation by defendant Escrow Transfers, and no specific facts are alleged that show the reliance element. [¶] The Court sustains with ten days leave to amend defendant Escrow Transfers'[s] general demurrer to the second cause of action of plaintiff's first amended complaint for breach of fiduciary duty. The second cause of action fails to allege

which escrow instruction defendant Escrow [Transfers] allegedly breached."

Lutz filed the SAC on October 15, 2007, adding causes of actions against Escrow Transfers and others for civil conspiracy to commit fraud and negligence plus realleging the fraud and breach of fiduciary causes of action. In the general allegations, Lutz added to paragraph 26 that Escrow Transfers "either knew or should have known that [Frengel]'s license was restricted and he was a convicted felon, which should have put [Escrow Transfers] on notice that they should have been particularly vigilant in all transactions involving [Frengel] so as to protect [Lutz] and others who were represented by [Frengel]."

The specific allegations regarding the sale of the mobile park regarding Escrow Transfers were the same as those in the FAC except that paragraph 91 had been renumbered 92 and now alleged that Kim McCrystal, on Lutz's behalf, had "requested all documents related to the transactions with [Escrow Transfers] from Ronee Kozlowski. Ms. Kozlowski stated that [Escrow Transfers] did not have any records of these transactions and refused to provide any documentation. [Escrow Transfers] has now produced numerous documents, despite their contention prior to the filing of this lawsuit that none existed. Plaintiff is informed and believes and on that information and belief alleges that [Escrow Transfers] concealed and/or destroyed documents they were required to maintain."

With regard to the fraud cause of action, all allegations were the same as in the FAC with the addition of paragraphs 117 and 118 which alleged that Escrow Transfers

was "either [a] knowing participant[] in the fraud or became [a] participant[] upon being contacted by [Lutz] and Ms. McCrystal and refusing to provide documents so as to conceal their involvement in the fraudulent transactions and obstruct [Lutz]'s ability to discover the truth of these transactions. [¶] Said misrepresentations, concealments and failures to disclose were intended to be relied upon by Plaintiff and Plaintiff justifiably relied upon them. . . ."

In the second cause of action for civil conspiracy to commit fraud, Lutz alleged that each transaction involved Frengel, Heiser and two other people who conspired and agreed to defraud money from Lutz and withhold the information, and that Escrow Transfers "was also involved in the fraud and conspiracy from its inception. Alternatively, [Escrow Transfers] joined the conspiracy and fraud perpetrated against [Lutz] when they intentionally failed to provide [Lutz] with copies of the documents pertaining to each transaction involving his property, documents that he was entitled to have copies of at his request." Lutz alleged that the "purpose of those actions by [Escrow Transfers] in failing to disclose the documents to [Lutz] was to conceal facts from [Lutz] that would have led him to conclude that a fraud was being perpetrated against him." Lutz alleged that the "last overt act in pursuance of the above-described conspiracy occurred when [Frengel] and [Escrow Transfers] failed to provide [Lutz] with the documents that he was entitled to regarding each transaction relating to his properties."

Lutz's allegations in the third cause of action for breach of fiduciary duty against Escrow Transfers were the same as in the FAC, with the addition of the phrase "nor to distribute such funds to or at the direction of unlicensed real estate brokers" at the end of

paragraph 131. The fourth cause of action for negligence realleged all the above paragraphs and stated "[a]lternatively, [Escrow Transfers] dealt with [Frengel] carelessly and negligently, without any regard to his past conduct and the circumstances of each transaction involving [Lutz]. Had [Escrow Transfers] exercised reasonable care as required by the escrow instructions and their statutory fiduciary duties, [that entity] would likely have discovered the fraud and prevented further damages to [Lutz]."

On November 21, 2007, Escrow Transfers demurred to the SAC on grounds Lutz had failed to amend his complaint to allege any facts to correct the pleading deficiencies identified by the court in sustaining its previous demurrer to the fraud and breach of fiduciary duty causes of action in the FAC and each cause of action in the SAC still failed to state facts sufficient to constitute a cause of action against it.³ Concurrently with the demurrer, Escrow Transfers filed a motion to strike the entire SAC for failing to state a cause of action and to strike the causes of action for civil conspiracy to commit fraud and negligence as being beyond the scope of permissible amendment.

In support of the demurrer and motion to strike, Escrow Transfers requested judicial notice of Frengel's broker license certification, Lutz's opposition to Escrow Transfers's earlier demurrer to the FAC and the court's ruling on that demurrer, as well as Lutz's verified responses to Escrow Transfers's discovery request for admissions numbers

³ Shortly before Escrow Transfers filed its demurrer, another defendant escrow holder, Chicago Title Company, also filed a demurrer to the SAC on the same grounds as Escrow Transfers plus the additional ground of uncertainty with regard to the allegations concerning its various property transactions involving Lutz and Frengel. Both demurrers were scheduled for hearing the same date. Lutz has only appealed from the ruling regarding Escrow Transfers's demurrer to the SAC.

2, 32 and 33. In request nos. 32 and 33, Lutz admitted that during all relevant times Frengel held a restricted California real estate broker's license and "was entitled to perform real estate license activities without the supervision of an employing broker." In responding to request no. 2, Lutz conceded that "Plaintiff was routinely presented with documents by Defendant Frengel for his signature which he would sign without review of the document or understanding of what was being signed beyond the representations made by Frengel. Frengel routinely would represent to Plaintiff that documents needed to be signed to ensure that transactions went smoothly and in Plaintiff's best interest. Plaintiff believed that his reliance on Frengel was justified because Frengel regularly made guarantees and promises to [Plaintiff] as to his loyalty to Plaintiff."

In his opposition to the demurrer and motion to strike, Lutz claimed that due to further discovery he could now positively identify Ronee Kozlowski as the employee of Escrow Transfers who was engaged in the conspiracy to commit fraud against him and who acted negligently on Escrow Transfers's behalf to carry out its duties as escrow holder. Additionally, Lutz claimed he could now allege that Escrow Transfers improperly communicated solely with Frengel instead of with him because Frengel was not the broker of record for Lutz and he "was unaware of any document authorizing [Escrow Transfers] to communicate solely with [Frengel]." Lutz requested the court permit him leave to amend his complaint to include such allegations and to add Kozlowski as an individual defendant.

At the January 18, 2008 hearing on the matter, after the court gave its tentative ruling to sustain the demurrer without leave to amend, and opined that Lutz had not given

the court any reason to believe he could amend his complaint to state a cause of action against Escrow Transfers, Lutz's counsel argued that some information had come out through Lutz's depositions that "there are documents that evidence window signings by people at [Escrow Transfers and Lutz] did not sign the documents. There's evidence, they put the document up against the window. They've got another document that's signed and they copy. We've got evidence of that." Counsel also represented that Lutz had stated at his depositions that Frengel had brought the "notary book from the escrow officer, who is also a notary at [Escrow Transfers], and used that notary book to get [his] signature. . . , which is in violation of the notary law." Counsel was relying on these facts coupled with those stated in his papers to allege that even though "the escrow instructions were complied with for the most part[,] the only way that [Escrow Transfers] obtained the signed escrow instructions is by obtaining fraudulent signatures of [Lutz]." Counsel believed that Lutz had already alleged such fraud in the complaint but could state additional facts if allowed to amend.

When the court commented that "we're stuck going nowhere, because we had a hearing . . . on this, and you were given leave to amend, but there was substantially nothing new in the complaint" and there was no indication the purported new facts could state a possible cause of action against Escrow Transfers, Lutz's counsel responded that the facts had been developed since that time because one problem was that Lutz was a dependent adult who has memory problems and during his depositions he remembered certain additional facts that were not known at the time the SAC was filed, such as

identifying Kozlowski as the agent for Escrow Transfers who communicated solely with Frengel instead of with Lutz who was the principal in the transaction.

Escrow Transfers argued that Lutz was essentially blowing "hot and cold on the facts," alleging first that Escrow Transfers had a duty to inquire about Frengel and that paying him a commission was somehow a breach of the escrow instructions or a duty owed Lutz, and then saying he is not the broker of record for which there would be no duty. Escrow Transfers's counsel represented he had been at Lutz's depositions and did not hear anything from them about window copying of signatures and that the testimony by Lutz about a notary book was "that something happened in 2001 approximately," but no evidence that the book was Kozlowski's. Counsel believed the basis of the entire complaint against Escrow Transfers was merely the fact that Lutz has no memory of signing documents and has thus concluded fraud was involved on its part. Counsel again pointed out that Lutz had not identified any escrow instruction that had not been followed or any fraudulent statements by Escrow Transfers.

The court sustained Escrow Transfers's demurrer without leave to amend, finding "that the burden of proving a reasonable possibility that the defect can be cured has not been met by the plaintiff, and that the last amended complaint . . . does not allege new allegations or facts from the prior pled complaint." Based on this ruling, the court found the motion to strike moot. The minute order of the court's ruling also granted Escrow Transfers's requests for judicial notice and specifically stated:

"The Demurrer of Defendant [Escrow Transfers] to Plaintiff John Lutz' [SAC] is SUSTAINED, WITHOUT LEAVE TO AMEND. The Court finds Plaintiff's [SAC] states insufficient facts to

constitute the claims asserted against Defendant [Escrow Transfers]. Plaintiff requested leave to amend his complaint to file[] a Third Amended Complaint but provided no new factual allegations or theories to implicate [Escrow Transfers]. (*Silva v. Block* (1996) 49 Cal.App.4th 345, 349, citing, *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808 [. . . the burden of proving a reasonable possibility that the defect can be cured by amendment is on the plaintiff.]) To carry [his] burden, plaintiff must show the manner in which he can amend his complaint and demonstrate how that amendment will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 348-349). Plaintiff has failed to do so. Under the circumstances of this case, the Court is disinclined to grant Plaintiff a fourth attempt to cure the pleading defects. Thus, Defendant's Demurrer is sustained without leave to amend, and the action is dismissed against [Escrow Transfers]. [¶] The Court's ruling herein, moots Defendant [Escrow Transfers's] motion to strike Plaintiff's prayer for punitive damages."

DISCUSSION

For purposes of analyzing the ruling on demurrer, we give the pleading a reasonable interpretation, reading it as a whole, its parts in their context, to determine whether sufficient facts are stated to constitute a cause of action or a right to the relief requested. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Our consideration of facts includes those evidentiary facts found in recitals of exhibits attached to a pleading (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94) as well as facts of which we may take judicial notice (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877). In doing so, " '[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] . . . When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by

amendment: . . . if not, there has been no abuse of discretion and we affirm. [Citations.]

The burden of proving such reasonable possibility is squarely on the plaintiff.'

[Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

Before applying these rules to the factual contexts alleged in the four causes of action of Lutz's SAC against Escrow Transfers for which he claims the court's ruling was in error, we set out some general requirements regarding actions involving escrow holders, which Escrow Transfers was alleged to be in this case.

As our Supreme Court noted in *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 706 (*Summit*):

" 'An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition.' [Citations.] An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited--limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.] If the escrow holder fails to carry out an instruction it has contracted to perform, the injured party has a cause of action for breach of contract. [Citation.] [¶] In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that '[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.]' [Citation.] On the other hand, an escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties instructions. [Citations.]" (*Id.* at p. 711.)

In other words, the obligations of the escrow holder to each party to an escrow are "strictly in accordance with the escrow instructions given by that party [citations]" (*Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 159, 162 (*Lee*)), and " 'the general rule [is]

that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions.

[Citation.]' " (*Summit, supra*, 27 Cal.4th at p. 715.) With these underlying principals in mind, we address in turn Lutz's causes of action alleged against Escrow Transfers in the SAC.

A. The Fraud Cause of Action

The well-established elements of " 'fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*)). A cause of action based on a fraudulent concealment theory must allege "(1) the defendant . . . concealed or suppressed a material fact, (2) the defendant [was] under a duty to disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff . . . sustained damage. [Citation.]" (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

In California, the elements of "fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a [fraud] pleading defective in any material respect.' " [Citation.] [¶]This particularity

requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate [entity] is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Lazar, supra*, 12 Cal.4th at p. 645, orig. italics.)

Here, the SAC failed to allege any misrepresentations made by Escrow Transfers even though the trial court had granted Lutz leave to amend the FAC to specifically allege such misrepresentations and to plead facts showing " 'how, when, where, to whom, and by what means the representations were tendered.' " [Citation.]" (*Lazar, supra*, 12 Cal.4th at p. 645.) Although Lutz identified Kozlowski in the SAC as the employee of Escrow Transfers who was involved as the escrow agent in the mobile park transaction, he did not specify any representations on her part that were made to him, when they were made, her knowledge of their falsity, her intent to defraud him by the misrepresentations, how he justifiably relied on the representations, or the resulting damage from such misrepresentation.

Contrary to Lutz's assertion that his general allegations that Escrow Transfers "falsely represented to the general public [which included him] that they provided quality services related to real estate transactions which met legal standards, made false representations to [him] and/or concealed material information from [him] that they were under a duty to disclose[, and t]hese representations were made for the purpose of

inducing [him] to become a client " when they "knew that they did not provide quality real estate broker, salesperson or escrow agent services. . . ." were sufficient to state a cause of action for fraud, such general conclusory allegations are not specific enough for actionable fraud involving a corporate entity like Escrow Transfers. In addition to alleging a defendant's knowledge of the falsity of the representations, the complaint must also specifically allege a factual basis for how the defendant knew his or her representations were false. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) Further, for a concealment theory to be stated, Lutz had to have specifically alleged how Escrow Transfers owed him a duty of disclosure other than to follow the escrow instructions, and if an instruction required a duty of disclosure to specifically plead such instruction. He did not.

Nor do we believe that Lutz's additional allegations in the SAC that Escrow Transfers became a "knowing participant[] in the fraud or became [a] participant[] upon being contacted by [Lutz] and Ms. McCrystal [sometime after October 2004] and refusing to provide documents so as to conceal their involvement in the fraudulent transactions and obstruct [Lutz's] ability to discover the truth of these transactions" supply the specificity required for a fraud cause of action against an escrow holder involving the mobile park transaction. Without any specific facts to show how Escrow Transfers became a knowing participant in the fraud or to show how the denial of the request from a third party, McCrystal, for documents regarding a transaction that closed escrow over four years earlier somehow was the proximate cause for any damages in that earlier completed transaction, a fraud cause of action against Escrow Transfers was not

properly stated. Consequently, we conclude the trial court properly sustained Escrow Transfers's demurrer to the fraud cause of action in the SAC.

B. The Conspiracy to Commit Fraud Cause of Action

The labeling of a cause of action as one for conspiracy to commit fraud is somewhat misleading as "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.]" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511 (*Applied Equipment*)). The major import of such an allegation is that it renders each participant responsible as a joint tortfeasor for all damages ensuing from the wrong, even if he or she did not act directly and regardless of the degree of activity. (*Ibid.*) However, "tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Ibid.*) In other words, a conspiracy, standing alone, "does no harm and engenders no tort liability." (*Ibid.*) Such "is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles. [Citations.]" (*Id.* at p. 514.)

Thus in this case, in order for Lutz to allege a claim for civil conspiracy against Escrow Transfers, he must allege all of the elements of a cause of action for the underlying tort of fraud against Escrow Transfers. (*Applied Equipment, supra*, 7 Cal.4th

at p. 514.) "Restated, in cases where the plaintiff alleges the existence of a civil conspiracy among the defendants to commit tortious acts, the source of substantive liability arises out of a preexisting legal duty and its breach; liability *cannot* arise out of participation in the conspiracy alone. . . . A duty. . . independent of the conspiracy itself, must exist in order for substantive liability to attach." (*Chavers v. Gatke Corp.* (2003) 107 Cal.App.4th 606, 614 (*Chavers*), orig. italics.)

Here, as noted above, Lutz did not state a good cause of action for fraud against Escrow Transfers in the SAC. Accordingly, an essentially derivative cause of action for conspiracy to commit such fraud also fails. (See *Applied Equipment, supra*, 7 Cal.4th at pp. 510-511; *Chavers, supra*, 107 Cal.App.4th at p. 612.)

C. The Breach of Fiduciary Duty Cause of Action

In order for a plaintiff to allege a cause of action for breach of fiduciary duty, he or she must set forth specific facts establishing "(1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]" (*Mosier v. Southern California Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044.) As noted above, however, the duty of an escrow holder in California is limited to exercising ordinary care and diligence in faithfully following the escrow instructions in any particular transaction. (See *Summit, supra*, 27 Cal.4th at p. 711.) Because the escrow holder is a limited, special agent of the parties, he or she has no duty to disclose facts to either party that are outside the scope of the escrow instructions and will not be liable for allegedly not disclosing certain suspicious facts about the transaction to a party to the escrow when following the instructions in the absence of specific instructions

requiring such disclosures. (*Axley v. Transamerica Title Ins. Co.* (1978) 88 Cal.App.3d 1, 8 (*Axley*); *Lee, supra*, 264 Cal.App.2d at pp. 162-164.)

Although the SAC in this case alleges a fiduciary relationship between Lutz and Escrow Transfers by reason of the escrow on the mobile park sale transaction, the duties or obligations by Escrow Transfers to Lutz are necessarily defined or limited by the escrow instructions for such transaction. Lutz, after given leave to amend his FAC allegations against Escrow Transfers to allege the escrow instruction or instructions it had breached in making certain disbursements from the escrow "without [his] knowledge or authorization. . . ," again failed to identify any such escrow instructions in the SAC that Escrow Transfers had breached.

Lutz's mere amendment to paragraph 131 of the SAC to allege that Escrow Transfers owed Lutz fiduciary duties not "to distribute [escrow] funds to or at the direction of unlicensed real estate brokers," did nothing to correct this deficiency specifically identified by the trial court at the time of the demurrer to the FAC. Aside from the fact such additional allegation does not identify a particular escrow instruction that was breached, the facts conflict with other facts affirmatively pled in the SAC and which were judicially noticed regarding Frengel being "at all relevant times licensed by the State of California as a real estate broker, albeit under restrictions."

Moreover, even assuming that Escrow Transfers owed Lutz an obligation "not to aid in fraudulent transactions against him nor to disburse funds owned by [him] held in escrow accounts without [his] knowledge or approval nor to distribute such funds to or at the direction of unlicensed real estate brokers," Lutz had still not connected these

conclusions with facts showing specific failures on Escrow Transfers's part to carry out certain identified escrow instructions in the SAC. (*Axley, supra*, 88 Cal.App.3d at p. 9.) Because Lutz had failed to correct this identified deficiency after being given a chance to amend it, the trial court was well within its discretion in sustaining Escrow Transfers's demurrer to the SAC.

D. The Negligence Cause of Action

In order to plead a negligence cause of action, a plaintiff must allege that the defendant owed him a legal duty to use due care, that the defendant breached that duty, and that such breach was the proximate or legal cause of the resulting injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917.) Again, in order for Lutz to plead a negligence cause of action against Escrow Transfers, an escrow holder, he must allege what escrow instruction it breached or did not faithfully follow. Lutz did not do so.

Rather, Lutz merely alleged that Escrow Transfers "dealt with [Frengel] carelessly and negligently, without any regard to his past conduct and the circumstances of [the mobile home] transaction. . . ." Although Lutz then alleged that had Escrow Transfers "exercised reasonable care as required by the escrow instructions and their statutory duties, [it] would likely have discovered the fraud and prevented further damage to [Lutz]," he did not identify what escrow instruction or statute was violated. He then affirmatively alleged that Escrow Transfers breached a duty of care by "dealing" with Frengel, even though no such duty exists in the absence of a specific escrow instruction.

Further, to the extent that Lutz alleged in other allegations incorporated into the negligence cause of action that Escrow Transfers had a duty under Business &

Professions Code section 10138 to investigate the real estate broker license status of Frengel, he obliterated such claim by inconsistently pleading in the affirmative that Frengel was a licensed California real estate broker at all relevant times. Under these circumstances, the trial court was also within its discretion in sustaining Escrow Transfer's demurrer to the SAC.

E. The Remaining Question

The question remains whether the trial court abused its discretion in sustaining the demurrer to Lutz's SAC without leave to amend. As noted above, when a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: . . . if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig, supra*, 27 Cal.4th at p. 1126.) Lutz has not met such burden in this case.

On appeal, as in his papers below and oral argument on the demurrer to the SAC, Lutz argues that he can amend his complaint to specifically plead fraud and the other causes of action against Escrow Transfers because it has now been determined through discovery that Frengel was not the broker of record for the mobile park transaction, that Kozlowski was aware of the fraudulent scheme involving Frengel and Heiser and she aided in that scheme, that she concealed the documents relating to the transaction to prevent him from discovering the fraud, that she violated various laws by allowing Frengel to use her notary book to obtain fraudulent signatures from Lutz, that she violated her duty to Lutz to inform him of the fraudulent transaction or to cancel it, that

she improperly communicated solely with Frengel because he was not the broker of record, that Lutz was unaware of any document authorizing Escrow Transfers to communicate solely with Frengel, and that Escrow Transfers unlawfully paid Frengel the sale proceeds of \$157,975.75 instead of Lutz who was listed on the escrow closing statement as the person to receive such proceeds.

We need not address each of these conclusory factual allegations as Lutz has still not shown the specificity of facts required to be pled for fraud involving an escrow holder. No specific escrow instructions have been pleaded or attached by reference to the papers to show what Escrow Transfers purportedly breached in its duty to Lutz in the mobile park transaction. Nor has he identified any specific misrepresentation by Kozlowski or any other agent of Escrow Transfers upon which he relied to his detriment in the transaction. Under these circumstances, Lutz has failed to carry his burden of showing a reasonable probability that he can amend the complaint to state valid causes of action for fraud, conspiracy to commit fraud, breach of fiduciary duty or negligence against Escrow Transfers. Therefore, the trial court did not abuse its discretion in sustaining Escrow Transfers's demurrer to the SAC without leave to amend.

DISPOSITION

The judgment is affirmed. Escrow Transfers is awarded costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.